

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

Case No. C16-107-RAJ-MLP

V.

REPORT AND RECOMMENDATION

MONSANTO COMPANY, *et al.*,

Defendants.

I. INTRODUCTION

This matter is before the Court on Defendants Monsanto Company, Solutia Inc., and Pharmacia Corporation’s (“Defendants”) Motion for Summary Judgment (“Defendants’ Motion”) (Defs.’ Mot. (dkt. # 326)). Particular to the Honorable Richard A. Jones’ reference to the Undersigned, the specific issues before the Court are: (1) whether the State of Washington (“State”) released Plaintiff City of Seattle’s (“City”) intentional public nuisance claim when the State settled its polychlorinated biphenyls (“PCBs”) lawsuit against Defendants in June 2020; and (2) whether *res judicata* otherwise bars the City’s public nuisance claim. (Dkt. # 503; *see also* Defs.’ Mot. at 1, 43-48.)

The City filed an opposition to Defendants' Motion (Pl.'s Resp. (dkt. # 442)), and Defendants filed a reply (Defs.' Reply (dkt. # 476)). This Court authorized a limited discovery period and requested supplemental briefing from the parties. (Dkt. ## 510, 513, 519, 578-79.) The Court heard oral argument from the parties on Defendants' Motion on November 16, 2022, and again after the conclusion of the limited discovery period, on March 30, 2023. (Dkt. ## 516, 583.) Having considered the parties' submissions, oral argument, the balance of the record, and the governing law, the Court recommends that Defendants' Motion (dkt. # 326) as to the referred issues be DENIED, as further explained below.

II. BACKGROUND

A. Procedural Background

The City's original complaint was filed in this action on January 25, 2016, but was amended by the City on May 4, 2016. (Dkt. ## 1, 31.) On May 18, 2016, Defendants filed a motion to dismiss the City's first amended complaint. (Dkt. # 34.) Relevant to the instant matter, the Defendants asserted, *inter alia*, that the City's suit was untimely. (*See id.*)

In deciding the timeliness of the City’s claims, the Honorable Robert S. Lasnik found that the City’s public nuisance claim was subject to a limitations period of two years, pursuant to RCW 4.16.130, and that the limitations period on the City’s claim began when it discovered its injury. (Dkt. # 60 at 7-8.) Judge Lasnik found the City had reason to discover its injuries as early as December 2000, when the City voluntarily entered into an Administrative Order on Consent, which required it to investigate the nature and extent of PCB contamination of its waterways. (*Id.* at 8.)

1 Nevertheless, Judge Lasnik noted Washington state law exempts local governments from
 2 applicable statute of limitations where the claim is brought “for the benefit of the state.”¹ (Dkt.
 3 # 60 at 8 (citing RCW 4.16.160).) Because the City was acting pursuant to sovereign authority
 4 delegated by the State under RCW 35.22.280(29)-(30)², derived from the State’s duty “to hold
 5 all navigable waters within the state in trust for the public,” Judge Lasnik determined the City’s
 6 public nuisance claim was timely asserted because the City’s efforts were asserted “for the
 7 common good.”³ (*Id.* at 9 (“[M]aintenance of public waterways fulfills the [City’s] delegated
 8 responsibility to act as steward of the land and waters within its boundaries for the benefit of the
 9 public at large, without regard to whether the beneficiaries are city residents.”).) Judge Lasnik
 10 denied Defendants’ motion to dismiss with respect to the City’s public nuisance and negligence
 11 claims, but granted the motion with respect to the City’s claims for defective design, failure to
 12 warn, and equitable indemnity, on February 22, 2017. (*Id.* at 16.)

13 On March 24, 2017, Defendants filed their first answer, which was later amended on
 14 September 6, 2017. (Dkt. ## 63, 91.) The parties’ pleadings remained the status quo in this
 15

16 ¹ As outlined in Judge Lasnik’s Order, municipal actions are brought “for the benefit of the state” when
 17 the actions “arise out of the exercise of powers traceable to the sovereign powers of the state which have
 18 been delegated to the municipality.” (Dkt. # 60 at 8 (quoting *Wash. Pub. Power Supply Sys. v. Gen. Elec.*
 19 *Co.*, 113 Wn.2d 288, 293 (1989)).) But when a municipality “regulates and administers the local and
 20 internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban
 21 community embraced within the boundaries of the municipal corporation” the municipal action is brought
 22 in a proprietary capacity. (*Id.* (quoting *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1171-
 23 72 (E.D. Wash. 2006)).)

24 ² Pursuant to RCW 35.22.280(29)-(30), any city of the first class, like the City, shall have power to
 25 prevent “the defilement or pollution of all streams running through or into its corporate limits,” and “to
 26 declare what shall be a nuisance, and to abate the same.” (*See also* dkt. # 60 at 9.)

27 ³ Because Judge Lasnik resolved Defendants’ statute of limitations issue on the City’s pursuit of this
 28 action on sovereign capacity grounds, Judge Lasnik did not reach or consider the City’s alternative
 29 argument—that its public nuisance claim resulted from a “continuing tort” which also tolled the
 30 limitations period. (*See* dkt. # 60 at 10 n.10.)

1 matter until July 22, 2022, when the parties stipulated to the filing of the City's second amended
 2 complaint. (Dkt. ## 261, 265.)

3 Pursuant to the stipulated filing, the City voluntarily dismissed its claim for negligence,
 4 removed the previously dismissed products liability and equitable indemnity claims, leaving only
 5 its public nuisance claim asserted. (Dkt. # 265; Second. Am. Compl. ("SAC") (dkt. # 267).) On
 6 August 8, 2022, Defendants filed their answer to the City's SAC. (Dkt. # 270.) On August 11,
 7 2022, Defendants filed their Motion, seeking summary judgment on their release and *res*
 8 *judicata* affirmative defenses amongst other bases. (*See* Defs.' Mot.)

9 On August 18, 2022, the City filed a motion to strike Defendants' release and *res*
 10 *judicata* affirmative defenses. (Dkt. # 343.) The issues in Defendants' Motion were referred to
 11 this Court by Judge Jones on October 13, 2022. (*See* dkt. # 503.) The City's motion to strike
 12 Defendants' release and *res judicata* affirmative defenses was subsequently referred on October
 13 19, 2022. (*See* dkt. # 506.) This Court heard oral argument on both motions on November 16,
 14 2022. (Dkt. # 516.)

15 On November 22, 2022, this Court issued a Report and Recommendation granting and
 16 denying in part the City's motion to strike, allowing for Defendants' release and *res judicata*
 17 affirmative defenses to proceed, but deferring ruling on Defendants' Motion to allow a limited
 18 period of discovery. (Dkt. # 519 at 7-8.) On January 4, 2023, Judge Jones adopted this Court's
 19 Report and Recommendation. (Dkt. # 538.) The parties' limited discovery period was ultimately
 20 extended by the Court until March 10, 2023. (Dkt. # 572.) This matter is now ripe for review.

21 **B. Factual Background**

22 This case generally arises out of Defendants' manufacture and sale of PCBs. Through this
 23 lawsuit, the City seeks to hold Defendants liable for PCBs that have escaped from use in

1 industrial and commercial applications into the Lower Duwamish Waterway (“LDW”) and the
 2 City’s stormwater system. (See SAC at ¶¶ 5-15.)

3 As discussed above, on January 25, 2016, the City filed the instant suit against
 4 Defendants. (See Compl. (dkt. # 1).) This action was one of a number filed by the law firm Baron
 5 & Budd, P.C. on behalf of government entities across the United States against Defendants due
 6 to alleged PCB contamination. (Park Decl., Ex. EI (dkt. # 452-8) at 1-2.) On December 8, 2016,
 7 the State filed suit against Defendants alleging its own claims relating to PCB contamination.
 8 (See Park Decl., Ex. EJ (dkt. # 452-9).) Baron & Budd represented both the City and the State in
 9 their PCB actions. (Wishik Decl. (dkt. # 445) at ¶ 16.) The State’s complaint in its lawsuit
 10 explicitly exempted the City’s PCB contamination claims and damages against Defendants from
 11 its action. (Park Decl., Ex. EJ at ¶¶ 81-82.)

12 In early 2019, Defendants and Baron & Budd, on behalf of the City and several other
 13 municipalities with PCB contamination claims, began engaging in settlement discussions in *City*
 14 *of Long Beach et al. v. Monsanto Company et al.*, C16-3493-FMO-AS (C.D. Cal.) (“Long Beach
 15 Class Action”). (See Park Decl., Ex. EI at 3.) The parties’ discussions in the Long Beach Class
 16 Action ultimately resulted in a proposed class settlement in March 2020 (“Class Settlement”)
 17 involving 2,528 cities and other entities. (See *id.*; Park Decl., Ex. EN (dkt. # 452-13) at 4.) The
 18 City was an initial class member at the time the Class Settlement was reached.⁴ (See Park Decl.,
 19 Ex. EI at 7-8 n.9.)

20 On March 14, 2022, preliminary approval of the Class Settlement was granted. (Park
 21 Decl., Ex. EI at 31-32.) However, on July 21, 2022, the City opted out of the Class Settlement.
 22 (Park Decl., Ex. EQ (dkt. # 452-16).) The City’s decision to opt out from the Class Settlement

23 ⁴ For reasons unknown, on March 9, 2020, Baron & Budd withdrew as counsel of record for the City in
 this action. (See dkt. # 149.)

1 occurred approximately two weeks before Defendants raised their release and *res judicata*
 2 defenses through their amended answer on August 8, 2022, and filed their Motion seeking
 3 summary judgment on the affirmative defenses on August 11, 2022. (*See* dkt. # 270; Defs.' Mot.)

4 As to the State's action, on June 24, 2020, Defendants and the State entered into a
 5 settlement agreement in the State's action ("State Settlement Agreement"). (Park Decl., Ex. EO
 6 (dkt. # 452-14).) Pursuant to the State Settlement Agreement, the State agreed to release all
 7 claims against Defendants relating to PCB contamination. (Park Decl., Ex. EO at ¶¶ 23-27.)
 8 Specifically, the State Settlement Agreement included the following language as to the released
 9 claims:

10 "Released Claims" means all claims, demands, rights, damages, obligations, suits,
 11 debts, liens, contracts, agreements, and causes of action of every nature and
 12 description whatsoever, ascertain or unascertained, suspected or unsuspected,
 13 existing now or arising in the future, whether known or unknown, both at law and
 14 in equity, which were or could have been alleged related to the manufacture, sale,
 15 testing, disposal, release, marketing or management of PCBs by Defendant,
 including but not limited to any and all claims based upon or related to the alleged
 presence of or damage caused by PCBs in the environment, groundwater,
 stormwater, stormwater and wastewater drainage systems, waterbodies, sediment,
 soil, air, vapor, natural resources, fish and/or wildlife within the State, and
 regardless of the legal theory or type or nature of damages claimed

16 (*Id.* at ¶ 15.) In addition, and relevant to the referred matters before the Court, the State
 17 Settlement Agreement defines "Releasing Persons" as: "[T]he State of Washington, and each of
 18 its officers acting in their official capacities, agencies, departments, boards, and commissions and
 19 any predecessor, successor or assignee of any of the above." (Park Decl., Ex. EO at ¶ 16.)

20 Under the terms of the State Settlement Agreement, Defendants agreed to pay the State
 21 \$95 million.⁵ (Park Decl., Ex. EO at ¶ 22.) On August 27, 2020, the State's action was dismissed

22
 23 ⁵ The City asserts that it was not a part of the settlement negotiations between Defendants and the State
 and that it did not participate in the State's case. (*See* Wishik Decl. at ¶ 17.) As a result, the City avers it
 did not, nor was it entitled to, recover any funds under the terms of the State Settlement Agreement. (*Id.*)

1 with prejudice by stipulation and order of dismissal in King County Superior Court. (DeBord
 2 Decl. (dkt. # 327) at ¶ 104, Ex. 103 (dkt. # 332-2).)

3 III. DISCUSSION

4 Defendants argue the City's public nuisance claim was released by the State when the
 5 State settled its lawsuit against Defendants in June 2020 for the same injuries the City claims in
 6 this action and that *res judicata* additionally bars the City's claim independent of the State
 7 Settlement Agreement. (Defs.' Second Suppl. Br. (dkt. # 578) at 1; *see also* Defs.' Mot. at 1,
 8 43-48; Defs.' First. Suppl. Br. (dkt. # 513) at 1-3, 6-10, 13-17.)

9 The City counters that such a release could not have occurred by operation of law and
 10 that it has produced substantial and unrebutted extrinsic evidence establishing that the State did
 11 not intend to release the City's claims through the State Settlement Agreement.⁶ (Pl.'s Second
 12 Suppl. Br. at 1; *see also* Pl.'s Resp. at 50-55; Pl.'s First Suppl. Br. at 3-13.) The City further
 13 argues that *res judicata* is inapplicable in this case because the State's action was dismissed by
 14 stipulation and settlement. (Pl.'s Second Suppl. Br. at 12 & n.22; *see also* Pl.'s Resp. at 55-63;
 15 Pl.'s First Suppl. Br. at 13-17.)

16

17⁶ The City additionally argues that Defendants' Motion applies only to the City's claim to the extent it is
 18 brought in a sovereign capacity. The City contends it retains a right to pursue its claim in all capacities,
 19 including a proprietary capacity as to its stormwater systems, which the City argues remains unaffected
 by the State Settlement Agreement. (Pl.'s Second Suppl. Br. (dkt. # 579) at 2 n.1 (citing Pl.'s First Suppl.
 Br. (dkt. # 510) at 20).)

20 Defendants have countered that the City disclaimed any proprietary basis to recover for its claim because
 21 its Rule 30(b)(6) deponent previously admitted the City was not seeking to recover costs "relating to
 22 physical injury to the lines or the structures" of its stormwater systems. (Defs.' Reply at 9 (citing Wishik
 23 Decl. (dkt. # 330-37) at 227:9-228:4).) Defendants further note that if the City's claim were found to be
 brought only in a proprietary capacity, it would require this Court to revisit the statute of limitations issue
 ruling previously addressed in Judge Lasnik's Order, which the City conceded at oral argument in
 November 2022. (*Id.*; *see also* dkt. # 518 at 37:6-39:8.)

As Defendants' Motion can be resolved on other grounds, this Court takes no position on the issue at this
 time.

1 As further explained below, the Court finds that Defendants' Motion should be denied
 2 because the parties to the State Settlement Agreement did not clearly intend to release the City's
 3 public nuisance claim and such claim does not remain otherwise barred by *res judicata*.

4 **A. Summary Judgment Standard**

5 Summary judgment is appropriate when the "movant shows that there is no genuine
 6 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
 7 Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party is
 8 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
 9 showing on an essential element of his case with respect to which he has the burden of proof.
 10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden
 11 of showing the Court "that there is an absence of evidence to support the nonmoving party's
 12 case." *Id.* at 325. The moving party can carry its initial burden by producing affirmative evidence
 13 that negates an essential element of the nonmovant's case or by establishing that the nonmovant
 14 lacks the quantum of evidence needed to satisfy its burden at trial. *Nissan Fire & Marine Ins.*
 15 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the
 16 nonmoving party to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co. v.*
 17 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must draw all reasonable inferences in
 18 favor of the nonmoving party. *Id.* at 585-87.

19 Genuine disputes are those for which the evidence is such that a "reasonable jury could
 20 return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 257. It is the nonmoving party's
 21 responsibility to "identify with reasonable particularity the evidence that precludes summary
 22 judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoted source omitted). The
 23 Court need not "scour the record in search of a genuine issue of triable fact." *Id.* (quoted source

1 omitted); *see also* Fed. R. Civ. P. 56(c)(3) (“The court need consider only the cited materials, but
 2 it may consider other materials in the record.”). Nor can the nonmoving party “defeat summary
 3 judgment with allegations in the complaint, or with unsupported conjecture or conclusory
 4 statements.” *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003); *see*
 5 *McElyea v. Babbitt*, 833 F.2d 196, 197-98 n.1 (9th Cir. 1987) (per curiam).

6 **B. Release (by Operation of Law)**

7 On this issue, the question presented to the Court is whether under Washington law, the
 8 State is capable of releasing a third-party municipality’s claim through its Attorney General
 9 (“AG”)—without notice or consent of that municipality—where such claim is brought under
 10 powers previously granted by the Washington Constitution or delegated by the Washington State
 11 Legislature.

12 To that end, Defendants argue the State’s release of its PCB contamination claims
 13 released the City’s derivative claim for public nuisance by operation of law. (Defs.’ Second
 14 Suppl. Br. at 1-5.) Defendants centrally claim that because the City brings its public nuisance
 15 claim under sovereignty “borrowed” from the State, the State’s release of its PCB claims leaves
 16 no sovereign claim for the City to pursue.⁷ (*Id.* at 2-3 (citing *Kelso v. City of Tacoma*, 63 Wn.2d
 17 913, 916-18 (1964))). Defendants further state that the City improperly construes powers
 18 enumerated by RCW 35.22.280 as prohibiting the State from settling its own sovereign claims as
 19 well as the State’s ability to bind the City through the State’s own litigation. (*Id.* at 4-5 (citing
 20 *City of Seattle v. McKenna*, 172 Wn.2d 551, 562 (2011); *City of Spokane v. J-R Distrib., Inc.*,
 21 90 Wn.2d 722, 730 (1978))).

22

23 ⁷ Defendants note the City previously and successfully argued that this case was brought in its sovereign capacity in front of Judge Lasnik “in the name or for the benefit of the state” to avoid the applicable statute of limitations under RCW 4.16.130. (Defs.’ Second Suppl. Br. at 2-3 (citing dkt. # 60 at 8-9).)

1 The City counters that Defendant's release by operation of law argument fails because:
2 (1) the Washington AG does not have the power to extinguish the City's claims premised on
3 sovereign powers granted by the Washington Constitution and statute; (2) the AG did not purport
4 to release the City's sovereign claims in the State's suit; and (3) such propositions of law were
5 clearly not settled in June 2020 when the State Settlement Agreement was executed. (Pl.'s
6 Second Suppl. Br. at 6-8.) The City additionally argues that its powers are exercised concurrently
7 and independent of the State, and not in a principal/agent relationship, because the City has
8 separate constitutional (Wash. Const. art. XI, § 11) and statutory (RCW 35.22.280(29)-(30))
9 powers to bring claims to abate nuisances and protect its waterways. (*Id.* at 8-10 (citing *Davison*
10 *v. State of Washington*, 196 Wn.2d 285, 302 (2020); *Emerald Enters., LLC v. Clark County*,
11 2 Wn. App. 2d 794, 803 (Wash. Ct. App. 2018)).)

12 Given the parties' divergent arguments considering this issue, this Court finds it
13 appropriate to provide a brief recitation of each party's cited authority. First, as to Defendants'
14 authorities, Defendants contend the Washington Supreme Court's decision in *Kelso* demonstrates
15 the City does not retain a right to pursue a claim premised on sovereign interests already released
16 by the State in the Settlement Agreement. (Defs.' Second Suppl. Br. at 2-3.) In *Kelso*, the
17 Washington Supreme Court found that because the State legislature had waived the State's
18 sovereign immunity, without specifically preserving the immunity for municipalities, the City of
19 Tacoma was liable for tortious conduct at the time of an automobile collision at issue. 63 Wn.2d
20 at 918-19. In so finding, and relevant to the instant matter, the Washington Supreme Court noted
21 "the common-law right of sovereign immunity is not in the municipality but in the sovereign
22 from which the immunity is derived." *Id.* at 916. "[Municipalities'] immunity, like their
23 sovereignty, is in a sense borrowed and the one is commensurate with the other." *Id.* at 917.

1 In addition, Defendants cite to *McKenna* as demonstrating that the Washington State
 2 Legislature vested statutory authority in the AG to sue on behalf of the State under RCW
 3 43.10.030(1) as a whole, and as such, the State through the AG is allowed to bind municipalities
 4 even over their objection. *See McKenna*, 172 Wn.2d at 562 (discussing AG authority under
 5 RCW 43.10.030(1) and finding Washington AG properly acted within such authority when he
 6 made the State a party to a multistate action seeking to enjoin enforcement of the Patient
 7 Protection and Affordable Care Act). Along this line, Defendants also cite to *J-R Distrib., Inc.*
 8 as evincing that the City's exercise of authority under RCW 35.22.280 can be inhibited where it
 9 conflicts with the province of state government.⁸ *See J-R Distrib., Inc.*, 90 Wn.2d at 730.

10 On the other hand, the City represents through its cited authorities that this action was
 11 brought against Defendants under the City's own constitutionally and legislatively delegated
 12 powers, which the City contends is an independent and concurrent exercise from the State's
 13 exercise of its authority through the AG. (Pl.'s Second Suppl. Br. at 8-9.) As support, the City
 14 cites to Article XI, section 11 of the Washington Constitution, which grants extensive police
 15 powers to municipalities in Washington: "Any county, city, town or township may make and
 16 enforce within its limits all such local police, sanitary and other regulations as are not in conflict
 17 with general laws." This provision, known as "home rule," presumes that local governments are
 18 "autonomous "⁹ *Emerald Enters., LLC*, 2 Wn. App. 2d at 803 (citing *Watson v. City of Seattle*,

20 ⁸ However, the Court notes the issue in that case was whether the City of Spokane's power to define and
 21 abate nuisances under RCW 35.22.280(30) authorized its adoption of a city ordinance that provided rules
 22 of evidence and procedures for its superior court, which the Washington Supreme Court rejected as an
 23 improper exercise of power because it infringed on the power the state judiciary and conflicted with
 existing state court rules and statutes. *See J-R Distrib., Inc.*, 90 Wn.2d at 726-32.

⁹ See Hugh D. Spitzer, "Home Rule" vs. "Dillon's Rule" for Washington Cities, 38 Seattle U. L. Rev. 809, 856 (Spring 2015) (discussing the broad authority of Washington cities and counties and finding

1 189 Wn.2d 149, 166 (2017)). “The scope of [a county’s] police power is broad, encompassing all
 2 those measures which bear a reasonable and substantial relation to promotion of the general
 3 welfare of the people.” *Id.* (alteration in original) (quoting *State of Washington v. City of Seattle*,
 4 94 Wn.2d 162, 165 (1980)).

5 The City further relies on the Washington Supreme Court’s decision in *Davison* as an
 6 example showing that the City and the State’s relation with respect to the exercise of sovereign
 7 police powers is not that of a principal and agent as suggested by Defendants. (Pl.’s Second
 8 Suppl. Br. at 9-10.) In *Davison*, the Washington Supreme Court found that the Washington
 9 legislature delegated to local governments the duty to provide indigent public defense to
 10 juveniles such that the State could not be held liable for alleged systemic deficiencies in the
 11 indigent public defense services system. 196 Wn.2d at 296, 302-03. In so ruling, the Washington
 12 Supreme Court noted that “while state and local governments share responsibility for carrying
 13 out the right to counsel, each unit of government has distinct duties.” *Id.* at 302.

14 The relationship between state and local government is not akin to agency law. The
 15 State is not a ‘principal’ legally responsible for the acts of its local government
 16 ‘agents’ when such acts occur within the scope of the local government’s delegated
 17 duty . . . We must respect the legislature’s plenary power to enact laws and the
 18 constitutional division of power between state and local government.

19 *Id.* Finally, the City notes that the Washington AG has also recognized that “the legislature must
 20 specifically act if it wants to *restrain* the authority of cities or counties.” Wash. AGO 2018 No.
 21 10, 2018 WL 6929235 (Wash. A.G. Dec. 26, 2018) (emphasis in original).

22 After an exploration of the parties’ cited authorities, the Court finds that neither side has
 23 provided this Court with on-point Washington law as to whether the State could release the

24 that, under home rule, “[Washington] cities have constitutionally granted police powers equivalent to
 25 those of the state . . . so long as the exercise of those powers does not conflict with general laws.”).

1 City's claim here by operation of law through the State Settlement Agreement. Nevertheless, the
 2 Court finds that it need not resolve this seemingly novel issue, because as suggested by the City
 3 and the parties' authorities, it is clear this issue was not plainly settled Washington law at the
 4 time the State Settlement Agreement was entered into by the State and Defendants in June 2020.

5 One of the foundational principles of contract law is that "the general law in force at the
 6 time of the formation of the contract is a part thereof." *Cornish Coll. of the Arts v. 1000 Virginia*
 7 *Ltd. P'ship*, 158 Wn. App. 203, 223-24 (Wash. Ct. App. 2010) (quoting *Arnim v. Shoreline Sch.*
 8 *Dist. No. 412*, 23 Wn. App. 150, 153 (Wash Ct. App. 1979)); *see also City of Olympia v.*
 9 *Travelers Cas. & Sur. Co. of Am.*, 2020 WL 42252, at *2 (W.D. Wash. Jan. 3, 2020). "Indeed, it
 10 has long been held to be 'the universal law that the statutes and laws governing citizens in a state
 11 are presumed to be incorporated in contracts made by such citizens, because the presumption is
 12 that the contracting parties know the law.'" *Cornish Coll. of the Arts*, 158 Wn. App. at 223-24
 13 (citing *Leiendecker v. Aetna Indem. Co.*, 52 Wn. 609, 611 (1909); *Fischler v. Nicklin*, 51 Wn.2d
 14 518, 522 (1958) ("[E]xisting law is a part of every contract, and must be read into it.")). These
 15 principles apply to both "statutes and the settled law of the land at the time the contract is made."
 16 *Id.* (citing *In re Kane*, 181 Wn. 407, 410 (1935)).

17 Defendants' argument and cited authorities fail to convince this Court that in June 2020 it
 18 was clearly settled under Washington law that the State's release of its public nuisance claim
 19 would act by operation of law to release the City's claim. "If the parties to a contract wish to
 20 provide for other legal principles to govern their contractual relationship, they must be expressly
 21 set forth in the contract. Absent a clear intent to the contrary disclosed by the contract, the
 22 general law will govern." *Wagner v. Wagner*, 95 Wn.2d 94, 98-99 (1980) (citations omitted).
 23 Here, despite significant briefing on this issue, Defendants fail to clearly demonstrate that settled

1 Washington law at the time of the State Settlement Agreement plainly allowed the State to
 2 release the City's claim without the City's consent or participation. The import of *Kelso*,
 3 *McKenna*, and *J-R Distrib., Inc.* certainly do not establish that such a release must follow by
 4 operation of law. Furthermore, and as examined in more detail below, the State Settlement
 5 Agreement did not clearly and unambiguously demonstrate the parties intended to release the
 6 City's claim by its terms or through the use of any explicit language evidencing such release.

7 Because Defendants' release by operation of law argument is without the support of
 8 settled Washington law at the time of the State Settlement Agreement, Defendants are not
 9 entitled to judgment as a matter of law on this issue. Therefore, summary judgment should be
 10 denied with respect to this claim.

11 C. Release (State Settlement Agreement Terms)

12 Next, Defendants' Motion argues that the City constitutes an "agency" of the State, and
 13 therefore, a "Releasing Person" under the State Settlement Agreement. (Defs.' Mot. at 1, 44-45;
 14 Defs.' Second Suppl. Br. at 5-6.) On this issue, as previously acknowledged by the Court in
 15 authorizing limited discovery, the parties disagree as to the reasonable meaning of "Releasing
 16 Person" as used in the State Settlement Agreement. (*See* dkt. # 519 at 7-8.) Specifically at issue,
 17 "Releasing Person" per the State Settlement Agreement is defined as:

18 "Releasing Persons" shall mean the State of Washington, and each of its officers
 19 acting in their official capacities, *agencies*, departments, boards, and commissions
 and any predecessor, successor or assignee of any of the above.

20 (Park Decl., Ex. EO at ¶ 16 (emphasis added).)

21 Defendants contend that nothing revealed by the Court's authorized limited discovery
 22 indicates an intent of the parties to depart from the definition of "agencies" in the State
 23 Settlement Agreement as it has been used historically by Washington courts to denote

1 municipalities acting in their sovereign capacity. (Defs.’ Second Suppl. Br. at 5-6.) The City
 2 argues that the term “agencies” remains subject to multiple reasonable interpretations and that
 3 Defendants failed to meet their burden of proof on summary judgment by relying solely on the
 4 four corners of the State Settlement Agreement as their evidentiary support.¹⁰ (Pl.’s Second
 5 Suppl. Br. at 2-6.) The City further notes that its extrinsic evidence and the other surrounding
 6 circumstances also clearly support that the parties to the State Settlement Agreement did not
 7 intend for the definition of “Releasing Persons” to include the City. (*Id.* at 3-6 (citing Pl.’s First
 8 Suppl. Br. at 1-6).)

9 The Court is to interpret settlement agreements the same way as other contracts. *McGuire*
 10 *v. Bates*, 169 Wn.2d 185, 188 (2010) (citing *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164
 11 Wn.2d 411, 424 n.9 (2008)). In interpreting contracts, Washington courts follow the “objective
 12 manifestation theory of contracts.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493,
 13 503 (2005). Under that approach, courts “impute an intention corresponding to the reasonable
 14 meaning of the words used” and generally give words “their ordinary, usual, and popular
 15 meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.* at
 16 503-04. The parties’ subjective intent is generally irrelevant if “an intention corresponding to the
 17 reasonable meaning of the words used” can be imputed. *Id.*

18 Per Defendants’ cited authority as to the meaning, Washington courts have frequently
 19 referenced municipalities as “agencies” of the State. *See, e.g., J-R Distrib., Inc.*, 90 Wn.2d at
 20 726 (quoting *Lauterbach v. City of Centralia*, 49 Wn. 550, 554 (1956)) (“A municipal

21
 22 ¹⁰ The City maintains that Defendants’ 30(b)(6) designee and Mr. William Dodero (who signed the State
 23 Settlement Agreement on behalf of Defendants) were questioned at deposition during the limited
 discovery period as to the existence of any extrinsic evidence inconsistent with the City’s position, and
 also failed to identify such evidence. (See Pl.’s Second Suppl. Br at 4 (citing Wagner Second Suppl.
 Decl., Ex. A (Abrams Dep. at 35:11-37:20, 41:7-43:16, 43:25-45:15, 47:12-55:24, 157:13-159:14), Ex. B
 (Dodero Dep. at 63:11-66:24, 70:3-74:8, 76:11-77:4)).

1 corporation is a body politic established by law as an agency of the state.”); *Neils v. City of*
 2 *Seattle*, 185 Wn. 269, 275 (1936) (“In the exercise of its sovereign power, the state may
 3 withdraw from a municipality . . . powers delegated to, or exercised by, them and redelegate such
 4 powers to another agency”); *Malette v. City of Spokane*, 77 Wn. 205, 227 (1913) (“[T]he power
 5 and duty to open and improve the highways rests primarily in the state as an attribute of
 6 sovereignty, and is delegated by it to the city as a governmental agency of the state”).

7 The City counters on this issue that Black’s Law Dictionary defines “local agency” to
 8 include a city, but “state agency” to be “an executive or regulatory body of a state” such as “state
 9 offices, departments, divisions, bureaus, boards, and commissions.” Black’s Law Dictionary
 10 (11th ed. 2019). The City suggests the ordinary meaning of state agencies also fails to
 11 countenance Defendants’ interpretation.¹¹ See *Mochizuki v. King County*, 15 Wn. App. 296,
 12 297-98 (Wash. Ct. App. 1976) (“Although several Washington decisions refer to the county as
 13 an arm or agency of the state . . . a county is not generally considered an agency of the state in
 14 spite of the general language found in these cases.”).

15 Here, given an examination of the State Settlement Agreement and the parties’ submitted
 16 authorities, the Court finds the reasonable meaning of “agencies” as utilized by the parties to the
 17 State Settlement Agreement with respect to “Releasing Persons” does not unambiguously lend
 18 itself to a conclusion that the City was intended to be included in the State’s release of its PCB
 19

20 ¹¹ The City further notes that several Washington statutes distinguish “state agencies” from cities and
 21 other local governmental entities. Compare RCW 42.56.010(1) (defining a “State agency” as a “state
 22 office, department, division, bureau, board, commission, or other state agency” with regard to Public
 23 Records Act requests) with *id.* (defining a “local agency” as a “county, city, town, municipal corporation,
 quasi-municipal corporation, or special purpose district, or any office, department, division, bureau,
 board, commission, or agency thereof, or other local public agency.”); see also RCW 42.56.070
 (imposing different Public Records Act obligations on “state agencies” and “local agencies”); RCW
 43.10.040 (allowing the State AG “to represent “all . . . agencies of the state” in legal matters and
 proceedings).

1 contamination claims. Because the Court finds the reasonable meaning of the term is not clear on
 2 its face, or by reference to the parties' authorities, the Court will turn to the parties' submitted
 3 extrinsic evidence.

4 Where relevant for determining mutual intent, the Washington Supreme Court has
 5 delineated that extrinsic evidence may be considered, including: "(1) the subject matter and
 6 objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the
 7 subsequent acts and conduct of the parties, and (4) the reasonableness of respective
 8 interpretations urged by the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990) (quoting
 9 *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254 (1973)). However, the Washington
 10 Supreme Court has clarified that "surrounding circumstances and other extrinsic evidence are to
 11 be used 'to determine the meaning of *specific words and terms used*' and not to 'show an
 12 intention independent of the instrument' or to 'vary, contradict or modify the written word.'"
 13 *Hearst Commc 'ns Inc.*, 154 Wn.2d at 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-
 14 96 (1999) (emphasis in original)).

15 On this aspect, Defendants have remained steadfast on their reliance on the "four
 16 corners" of the State Settlement Agreement as having released the City based on its terms.
 17 (Defs.' Second. Suppl. Br. at 5-6; *see also* dkt. # 572 at 5-6.) Defendants have thus not provided
 18 this Court with any extrinsic evidence demonstrating that "agencies" was intended in "Releasing
 19 Persons" to release the State's municipalities, including the City, by its terms.

20 Conversely, the City has offered considerable evidence demonstrating the parties to the
 21 State Settlement Agreement did not intend for "agencies" in the State Settlement Agreement to
 22 release the City's claims. The City has submitted the declarations of: (1) William Sherman, Chief
 23 of the Environmental Protection Division of the State AG's Office; (2) Peter Holmes, the former

1 Seattle City Attorney; and (3) attorney John Fiske, who represented the State in connection with
 2 the State Settlement Agreement, all of whom represent that the State (and its counsel) did not
 3 intend to release the City’s claims by operation of the terms of the State Settlement Agreement.
 4 (See Sherman Decl. (dkt. # 522-3) at ¶¶ 3-5; Holmes Decl. (dkt. # 522-4) at ¶¶ 3-4; Fiske Decl.
 5 (dkt. #522-5) at ¶¶ 9-11.) Furthermore, the City has previously submitted, *inter alia*, that the
 6 State Settlement Agreement’s use of the term “agencies” in “Releasing Persons” could not have
 7 been intended to release the City’s claim given Defendants’ continued litigation of this action
 8 since the State Settlement Agreement was reached (*see* Pl.’s First Suppl. Br. at 1-3) as well as the
 9 existence of other State settlement agreements containing language explicitly releasing claims
 10 brought by its political subdivisions to the extent of the State AG’s authority to do so (*see*
 11 Wagner First Suppl. Decl., Ex. O (dkt. # 511-15) at 5-6).

12 Based on the ambiguity in the State Settlement Agreement itself with respect to use of the
 13 term “agencies” in “Releasing Persons,” Defendants’ lack of extrinsic evidence to support their
 14 preferred interpretation of that term as releasing the City’s claim, and the City’s proffered
 15 extrinsic evidence, the Court concludes that summary judgment in favor of Defendants on this
 16 claim should not be granted.

17 **D. Res Judicata**

18 Last, Defendants argue that *res judicata* bars the City’s attempt to “split” the sovereign
 19 public nuisance claim for the LDW because it properly belonged to the subject matter of the
 20 State lawsuit. (Defs.’ Second Suppl. Br. at 6-9.) Defendants argue *res judicata* bars the City’s
 21 claim, independent of any terms contained in the State Settlement Agreement, because settlement
 22 agreements are given *res judicata* effect as to the issues that were or should have been resolved
 23 by the parties in the prior proceeding. (*Id.* at 6-7.) The City argues that *res judicata* is

1 inapplicable in this case because the preclusive effect of a dismissal based on a settlement is no
 2 greater than the release agreed to by the parties, and because the City was not included within the
 3 scope of the State Settlement Agreement. (Pl.’s Second Suppl. Br. at 12; *see also* Pl.’s First
 4 Suppl. Br. at 13-14.)

5 *Res judicata* prohibits a party from bringing a claim already litigated or a claim that could
 6 have been litigated in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 67 (Wash. Ct. App.
 7 2000). Washington law governs the preclusive effect of a settlement agreement. *Manufactured*
 8 *Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1031 (9th Cir. 2005). As such, a settlement
 9 agreement has the same force and effect as a final judgment on the claim for purposes of *res*
 10 *judicata*. *Hadley v. Cowan*, 60 Wn. App. 433, 439 (Wash. Ct. App. 1991) (“*Res judicata* applies
 11 to claims that were, or should have been, litigated in a prior proceeding between the parties,
 12 including settlement agreements.”).

13 However, in the settlement agreement context, the preclusive effect of a dismissal based
 14 on a settlement is no greater than the release agreed to by the parties. *See Wojciechowski v.*
 15 *Kohlberg Ventures LLC*, 923 F.3d 685, 689-90 (9th Cir. 2019) (“[G]iven the contractual nature
 16 of . . . settlement agreements, the preclusive effect of a judgment based on such an agreement
 17 can be no greater than the preclusive effective of the agreement itself.” (quotations omitted)); *see*
 18 *also F.T.C. v. Garvey*, 383 F.3d 891, 898 n.7 (9th Cir. 2004) (“The basically contractual nature
 19 of consent judgments has led to general agreement that preclusive effects should be measured by
 20 the intent of the parties.”). In determining the *res judicata* effect of an order of dismissal based
 21 upon a settlement agreement, the court should therefore “attempt to effectuate the parties’
 22 intent.” *See Wojciechowski*, 923 F.3d at 690 (quoting *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*,
 23 371 F.3d 1285, 1288 (11th Cir. 2004)). The best evidence of parties’ intent is the settlement

1 agreement as interpreted according to principles of contract law. *Id.* (citing *Norfolk S. Corp.*, 371
 2 F.3d at 1289).

3 On this issue, both parties cite to *Holden-McDaniel Partners, LLC v. City of Arlington*, a
 4 case where the trial court determined that a set of the plaintiff's claims were barred by *res*
 5 *judicata* based on a prior settlement and release entered by the parties. 2017 WL 959502 at *3
 6 (Wash. App. Jan. 9, 2017). In that case, the Washington Court of Appeals ruled that *res judicata*
 7 did not apply because the settlement had not been reduced to a judgment, but found that
 8 regardless of whether *res judicata* applied, the dispute between the parties was over the scope
 9 of the settlement release, and not its finality. *Id.* at *6-7. "That dispute is to be resolved by
 10 resorting to principles of contract interpretation, not according to the law regarding the
 11 enforceability of judgments." *Id.* at *7.

12 Here, the parties' disputes concern the scope of any release of the City's claims by the
 13 State Settlement Agreement. As considered above with regard to Defendants' release arguments,
 14 the scope of the State Settlement Agreement did not clearly release the City by operation of law
 15 or by its own terms. Consequently, the preclusive effect of a judgment based on the State
 16 Settlement Agreement can be no greater than the preclusive effective of the State Settlement
 17 Agreement itself. See *Wojciechowski*, 923 F.3d at 690-91; *Holden-McDaniel Partners, LLC*,
 18 2017 WL 959502 at *6-7. Because this Court has determined that the City and its claim were not
 19 contemplated in the scope of the State Settlement Agreement to be released, Defendants' *res*
 20 *judicata* argument should be rejected.

21 However, even if the Court were to find *res judicata* applicable in this action, Defendants
 22 fail to demonstrate that all of the *res judicata* factors are clearly satisfied. Under Washington
 23 law, for *res judicata* to apply, a prior judgment must have a concurrence of identity with a

1 subsequent action in: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the
2 quality of the persons for or against whom the claim is made. *Loveridge v. Fred Meyer, Inc.*, 125
3 Wn.2d 759, 763 (1995). Though “it is not necessary that all four factors favor preclusion to bar
4 the claim,” see *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F. Supp. 3d 1161, 1166 (W.D.
5 Wash. 2014) (citations omitted), *res judicata* is also not applied in all situations where the
6 elements of the doctrine are met. *Reeves v. Mason Co.*, 22 Wn. App. 2d 99, 116-17 (Wash Ct.
7 App. 2022) (discussing circumstances in which *res judicata* is not applied, including exceptions
8 made on the basis of public policy).

9 Here, there is no concurrence of identity of the parties. As noted above, the ambiguity of
10 the term “agencies” in the State Settlement Agreement and the extrinsic evidence provided by
11 the City demonstrate the City was not intended to be included in the State Settlement Agreement.
12 Defendants similarly fail to demonstrate that there was clear privity between the City and State
13 with respect to the State Settlement Agreement, such that the City and State could be regarded as
14 the same person or party with respect to the public nuisance claim. The City was not in control,
15 nor substantially participated, in the State’s action. See *Loveridge*, 125 Wn.2d at 764 (“Privity is
16 established in cases where a person is in actual control of the litigation, or substantially
17 participates in it even though not in actual control.”). Moreover, despite Defendants’ position
18 that the delegated and sovereign nature of the City’s claim results in the City sharing the same
19 identity as the State for the application of *res judicata* to the City’s claim, Defendants fail to cite
20 any authority holding that such is required or permitted.

IV. CONCLUSION

For the foregoing reasons, this Court recommends that Defendants' Motion (dkt. # 326) be DENIED as to the referred issues to the Undersigned. A proposed Order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit by no later than **fourteen (14)** days after the filing of this Report and Recommendation. Objections, and any response, shall not exceed twelve pages. Failure to file objections within the specified time may affect a party's right to appeal. Objections should be noted for consideration on the District Judge's motion calendar **fourteen (14)** days after they are served and filed. Responses to objections, if any, shall be filed no later than **fourteen (14)** days after service and filing of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **April 28, 2023**.

The Clerk is directed to send copies of this Order to the parties and to Judge Jones.

Dated this 12th day of April, 2023.


MICHELLE L. PETERSON
United States Magistrate Judge